Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

LENORA MCNEIL,

Petitioner,

v.

SCOTLAND COUNTY,
a body politic and incorporated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER MORE OBJECTIVE PERIMETERS SHOULD BE EMPLOYED BY THE DISTRICT COURT IN ANALYZING WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS WHEN A NON-MOVANT TITLE VII PLAINTIFF PRESENTS EVIDENCE OF PRETEXT WHILE OPPOSING A SUMMARY JUDGMENT MOTION?

CORPORATE DISCLOSURE

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Lenora McNeil petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, 53 Fed. Appx. 242; 2002 US App. Lexis 26140 (4th Cir. 12/18/02), is set forth in the Appendix hereto (App., infra, 1a). The Memorandum of Decision of the District Court for the Eastern District of North Carolina is unpublished and set forth in the Appendix hereto (App., infra, 5a).

JURISDICTION

The final judgment of the United States of Appeals for the Fourth Circuit affirming the decision of the District Court of the Middle District of North Carolina was entered on December 18, 2002. (App., infra, 1a). The Order of that court denying Petitioner's request for rehearing and suggestion for rehearing en banc was entered on January 27, 2003. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c). The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedures, Rule 56(c)

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE FACTS

The petitioner, Ms. Lenora McNeil, an African American, was hired as a Clerk Assistant III in the Medicaid Unit of the Department of Social Services for Scotland County (hereinafter referred to as "DSS") in 1995. She was subsequently promoted to an Intake Maintenance Technician, but after she filed her first EEOC charge in November 12, 1998, she was demoted back to the clerk position she originally held when she was first employed with DSS. The evidence showed that after this EEOC charge, the campaign began by DSS to show that Ms. McNeil was suddenly not qualified as a case worker, that she was performing her work inefficiently and that she was not a team player. The District Court did not even mention this critical evidence of retaliation which commenced the non-stop efforts by DSS to discredit Ms. McNeil's work.

She was also relocated from her office and for a period of time, she had no duties or responsibilities given to her. When her duties were restored, she was given new duties that she was unfamiliar with and she was not provided any formal training in order to perform these new duties. The District Court drew an inference that DSS provided Ms. McNeil with a schedule of daily job functions to improve her work performance was in direct contradiction with Ms. McNeil's evidence that during this same exact period of time her duties had been stripped from

her and she in fact was not being assigned any duties. The evidence by Ms. McNeil showed that even after her immediate supervisor was promoted, he remained in her chain of command and continued to make final decisions about her work environment.

DSS claimed that she was issued assignments in this fashion because she was inefficient in performing her duties. Ms. McNeil rebutted this contention from DSS with evidence that the denial of a permanent job description was a retaliatory tactic designed to make it appear that she was not adequately performing her work when she in fact was.

The requirement that Ms. McNeil report to work on a daily basis without prior knowledge of what work she would be assigned made it impractical for her to plan any assignments. DSS supervisors used this ploy to make it appear that Ms. McNeil was inefficient in her work. These claims by DSS supervisors that Ms. McNeil was given daily tasks to improve her efficiency were rebutted by clear evidence from Ms McNeil that without a permanent position description this was how she was routinely assigned duties as part of the retaliatory harassment directed toward her.

From the time that Ms. McNeil began working at DSS until she departed, she never received a permanent position description She found difficulties in maintaining continuity in the performance of her duties because DSS supervisors were changing her work requirements on a daily basis. While she was provided a generic position description that one was fluent and frequently changed. By not giving Ms. McNeil a permanent position description, DSS was free to assign her any type of duties that included case worker assignments. On a day to day basis, she did not know what her work assignments would be, who she would

be working for or how long she would have to complete an assignment.

Although the issue of Ms. McNeil not having a permanent position description was an issue before she filed her first EEOC charge, there was no evidence offered in the record that the quality of her work was an issue until after she filed her EEOC charges. Prior to the EEOC charge, Ms. McNeil was given a written warning because she made comments about not receiving a permanent position description, but this warning was not in regard to her work performance. Her supervisor simply documented his apparent frustrations (and her frustrations) about Ms. McNeil not receiving a permanent position description. There was no evidence in the record that prior to Ms. McNeil's first EEOC charge that she was ever guilty of misconduct or malfeasance of her duties.

Although Ms. McNeil was never given a permanent position description as a technician and was denied several positions as a case worker, she was required to perform many duties normally assigned to experienced case workers. One case worker, Ms. McDuffie testified that Ms. McNeil was doing the same type caseworker duties as the other case workers. Ms. McNeil performed these duties without the benefit of any training. Although she performed her case worker duties without adequate training, it was uncontroverted that she made very few errors. Evidence in the record proved that each time Ms. McNeil applied for a promotion as a case worker, her case worker duties were unjustly scrutinized by supervisors in order to discredit her performance and that DSS made attempts to discipline her for alleged errors with her case worker assignments. Only after DSS had attempted to discipline her for minor errors on her case worker assignments was she ever offered a training opportunity that was routinely given to the other employees.

The trial court's finding that Ms. McNeil could not work independently and was inefficient were facts that were strongly denied and disputed. The evidence as forecasted by Ms. McNeil established that DSS created a paper trail of concocted and misleading representations about Ms. McNeil's work performance solely to impede her efforts to be promoted. Between August 1998 and November 1999, Ms. McNeil applied for the following promotions.

a. Income Maintenance Case Worker II in the Medicaid Unit (April 28, 1999)

b. Income Maintenance Case Worker II in the Food Stamp Unit (July 29, 1999)

c. Case Worker II in the Medicaid Unit (August 27, 1999)

d. Income Maintenance Case Worker II in the Medicaid Unit (11/8/99)

e. Income Maintenance Case Worker II in the Food Stamp Unit

Initially, DSS took the position that Ms. McNeil was simply not qualified for the positions that she applied. In his deposition, her supervisor testified that Ms. McNeil was not qualified for these positions. This testimony was contradicted by the DSS personnel official, Jan-Marie Fesmire, who testified that Ms. McNeil was in fact qualified for each position that she applied. She admitted that Ms. McNeil was qualified as an Income Maintenance Case Worker I working as an Income Maintenance Case Worker II.

Thereafter, DSS modified their contentions as to why Ms. McNeil was not considered for a promotion by claiming

that it was her lack of teamwork and poor efforts that made her an unsuitable applicant. DSS then sought to balance their "legitimate" reason for not fairly considering Ms. McNeil for each promotion by claiming that she was either not qualified or that she lacked the requisite interpersonal skills. These drastic changes by DSS in explaining the non-selections created the inference that their "legitimate" reasons for not selecting Ms. McNeil were pretextual.

The stress from the treatment from DSS caused Ms. McNeil to seek medical leave. She took a short leave period, but returned only to have her supervisors resume the harassment, by reassigning her new case worker duties. When the unreasonable scrutiny of her work continued, she became so severely depressed that she was forced to take an extended leave from DSS.

While on extended medical leave, Ms. McNeil was under the care of Ms. Rosalyn Harris-Offuit, CRNA, BS, LPPC, LNC, ADS. Once it was determined that Ms. McNeil was suffering from post-traumatic stress, it was recommended that she minimize her contact with DSS as part of her recovery. Ms. Atwannia Latonya McQueen, Ms. McNeil's daughter, agreed to serve as liaison between DSS and Ms. McNeil.

Near the end of the extended leave period; Ms. Harris-Offuit and Ms. McNeil agreed that she needed more time to recover. DSS extended the extended leave period by 30 days to October 31, 2000. On October 16, 2000, DSS advised Ms. McNeil that her extended leave was about to expire and that it was necessary for her to provide alternatives.

Ms. Harris-Offuit responded on behalf of Ms. McNeil two days later on October 18, 2000 requesting that Ms. McNeil's leave be extended to January 3, 2001. Ms.

Harris-Offuit submitted this request as she had submitted the previous requests as prescribed by DSS. DSS did not respond to Ms. Harris-Offuit, but instead notified Ms. McNeil on October 30, 2000 that she was being terminated.

REASONS FOR GRANTING THE PETITION

I. WHETHER A NON-MOVANT TITLE VII PLAINTIFF'S EVIDENCE OF PRETEXT SHOULD BE ANALYZED BY THE DISTRICT COURT BY MORE OBJECTIVE PERIMETERS AS TO WHEN A GENUINE ISSUE OF A MATERIAL FACT EXISTS?

Introduction

Petitioner (Ms. McNeil) is asking the Court to establish a more standard process for determining whether a "genuine issue of a material fact" exists as it relates to a non-movant plaintiff's evidence of pretext in a summary judgment. Summary judgment is proper if the movant demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P.56(c). In applying this standard, the court is required to view the factual record and draw all reasonable inferences most favorably to the nonmovant who in this case was the plaintiff. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Principles of Summary Judgment

Summary judgment may not be granted unless the submission of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. Summary judgment should be granted only where it is "perfectly clear that no issue of fact is

involved and inquiry into facts is not necessary to clarify application of the law." McKinney vs. Bd. Of Trustees of Maryland Community College, 95 F.2d 924, 928 (4th Cir. 1992).

In many ways, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) was a seminal case insofar as it recognized that an issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. It was further explained that an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. See Id. Accordingly, the substantive law[1] will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. To be "genuine," a dispute must involve evidence upon which a jury could find for the nonmoving party. Id. The burden is upon the moving party to show "that there is an absence of evidence to support the

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[1]Title VII is the primary substantive law involved in this case. To prove unlawful discrimination under the legal framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1877 (1973), the employee "must carry the initial burden... of establishing a prima facie case, by producing evidence adequate to create an inference that an employment decision was based on a(n) (illegal) discriminatory criterion," Teamsters vs. United States, 431 U.S. 324, 358 (1977). Once established, the burden shifted to Scotland County (DSS) to "rebut the presumption of discrimination by producing evidence that the discharge of Ms. McNeil was for a legitimate, nondiscriminatory reason." Texas Dept't of Community Affairs v. Burdine, 450 U.S.. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). Assuming DSS had in fact met their burden of production, the remaining question was whether Ms. McNeil forecasted sufficient evidence to create a genuine dispute about a material fact involving pretext. Mary's Honor Ctr. V. Hick, 509 U.S. 502, 506-11, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)

If the movant carries this initial burden, the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. at 324; Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 506 U.S. 1013, 121 L. Ed. 2d 566, 113 S. Ct. 635 (1992).

Legal Analysis

Ms. McNeil established by her evidence a prima facie case of non-selection under Title VII, but the District Court found that Ms. McNeil did not establish sufficient evidence of pretext to overcome DSS's "legitimate non-discriminatory" reasons for her treatment. This finding by the court was made despite Ms. McNeil's evidence showing that DSS had retreated from these initial claims that Ms. McNeil was not qualified for these positions and later based the non-selections on her alleged conduct and work performance.

As an initial matter, it should be made clear that Ms. McNeil is not contending that the decision by DSS not to give her a position description was a Title VII violation. Nor was Ms. McNeil contending that the decision by DSS to assign her duties on a daily basis was a *per se* violation of Title VII. The conduct of DSS that Ms. McNeil is contending was a Title VII violation was the misrepresentation by DSS

that her duties were being assigned to her on a daily basis because she was inefficient in performing her work when in fact she was being assigned these case worker duties because she did not have a permanent work schedule.

The pretext evidence clearly showed that as a Clerk Assistant III, Ms. McNeil was routinely assigned case worker assignments which were outside the realm of what she had originally been hired to perform. Furthermore, her case worker assignments were subjected to an inordinate amount of scrutiny after each selection and she was disciplined for three minor errors in her case worker duties although she was never given any training to be a case worker. Despite the repeated assertions after each non-selection by DSS that Ms. McNeil's inefficient work performance was the reason why she was not promoted to a case worker, DSS continued to assign Ms. McNeil case worker assignments. A reasonable jury could have inferred that DSS's reasons for not selecting Ms. McNeil were pretextual in light of the fact that DSS appeared to have a problem with her case worker duties only when she was applying for a promotion into a case worker postion.

DSS also claimed that Ms. McNeil was discharged after she failed to respond to their October 16, 2000 request that she provide alternatives to her extended sick leave. In fact, Ms. McNeil responded through her health care provider on October 18, 2000 with a request that DSS notify her immediately if they had a concern about her proposed alternative to the extended leave. DSS terminated Ms. McNeil on the basis that she did not respond. In light of the uncontradicted evidence that Ms. McNeil did respond, a reasonable jury should have been allowed to consider the pretextual nature of the reasons given by DSS for terminating her.

The essence of Ms. McNeil's evidence of pretext was that she was a victim of retaliatory harassment by the actions of DSS in unreasonably scrutinizing her work in an effort to concoct false justifications not to select her for these positions. This evidence revealed a pattern whereby immediately before and/or after she applied for each promotion, uncorroborated allegations by her supervisors surfaced about her work performance or conduct that were used to support her non-selection. The record supports instances of intense scrutiny upon her work, the withholding of training and duties, the refusal to permit her to receive proper training, the threats of discipline as well as the actual imposition of reprimands and other disciplinary actions against her which were all sufficient forms of harassing behavior of a continuous nature by DSS to adversely effect the "terms, conditions, or benefits of (her) employment." That this same evidence supported her hostile working environment claim did not preclude it from also serving as evidence of pretext. A reasonable jury could have inferred that these tactics of retaliatory harassment were tailored by DSS to stifle her attempts to be promoted.

The primary focus of the substantive law as outlined in McDonnell Douglas was to provide Ms. McNeil with an opportunity to produce evidence of a prima facie case of discrimination through indirect evidence which established an inference of discrimination. However, the district court impermissibly altered the recognized burden of proof standard by adopting DSS's version of critical factual determinations that were clearly disputed issues of fact such as that Ms. McNeil could not work independently and was inefficient, that she was not qualified for the positions or that the quality of her work and interpersonal skills were lacking. The manner in which the District Court credited the justifications offered by DSS while discounting the evidence of pretext presented by Ms. McNeil represented an improper credibility determination and a clear

measurement of the evidence which was contrary to the principles of summary judgment.

The premise of her pretext evidence was that she was unjustly accused of misconduct or poor performance by DSS each time she applied for a promotion. The evidence was equally clear that while Ms. McNeil was required to perform the duties of a case worker, she was deemed not qualified to be promoted into a case worker position on each occasion that she applied. The record also showed that the work performance issues raised by DSS each time she applied for a position were associated with the same case worker duties that Ms. McNeil was required to perform without adequate training that was afforded to others. A reasonable factfinder could have inferred pretext from the simple fact that DSS continued to assign Ms. McNeil case worker duties to perform under threat of discipline even after they continued to deny her any case worker promotions.

The District Court relied upon Hawkins v. Pepsico, Inc,. 203 F.2d 274, 280 (4th Cir. 2000) in ruling that Ms. McNeil failed to produce "evidence that shows (DSS's) assessment of her performance was dishonest or... not the real reason for her termination-- as the law requires...." Id. The Court's conclusion that Ms. McNeil simply disputed the merits of DSS's evaluation missed the focus of her evidence of pretext. Ms. McNeil's efforts to rebut the claims by DSS that her work performance was poor was miscategorized by the District Court as opinion evidence regarding her beliefs about the quality of her work as compared to the weight the Court gave DSS as to their opinion about the quality of her work. In a case where a material issue is whether the quality of the plaintiff's work was the "non-discriminatory reason" for her non-selection, the District Court should not have disregarded Ms. McNeil's rebuttal evidence (by her and her witnesses) that she was performing her duties well

and that she was being harassed by the manner in which her work was evaluated by DSS.

The record exposed the glaring contradiction that DSS made when they claimed that Ms. McNeil was not qualified to receive a case worker promotion even though she was still required to perform these same duties. A reasonable jury could easily have inferred that DSS's willingness to continue to assign Ms. McNeil caseworker assignments after each occasion that she was turned down for a case worker promotion was sufficient evidence of pretext. This uncontradicted evidence involved material factual circumstances that supported the very foundation of Ms. McNeil's evidence of pretext and as such, should have been resolved by the fact finder and not the District Court.

Although DSS failed to meet its burden under Rule 56 to rebut the evidence of pretext, Rule 56 does not provide a recognized process that would have been instructional to the District court as to how Ms. McNeil's evidence of pretext should have been evaluated. An issue is "genuine" if the evidence presented is such that a reasonable jury could resolve the issue in favor of the nonmoving party and a "material" fact is one that might affect the outcome of the suit under governing law. Fajardo Shopping Ctr. V. Sunn Alliance Ins. Co., 167 F.3d 1, 7 (1st Cir. 1999). Put another way, a "genuine" issue is one "that properly can be resolved only by a finder of fact because (it) may reasonably be resolved in favor of either party. Anderson v. Liberty Lobby, 477 U.S. at 250 and a "material" issue is one that "affects the outcome" of the suit to aver the lack of a genuine, material factual issue. Id at 248. The burden is upon the moving party to aver the lack of a genuine, material factual issue as to the evidence of pretext presented by Ms. McNeil. Finn v. Consolidated Rail Corp., 782 F. 2d 13, 15 (1st Cir 1986).

Proof that DSS's explanations were unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt. Wright v. West, 505 U.S. 277, 296, 120 L. 3d 2d 225, 112 S. Ct. 2482 (1982).

Moreover, once DSS's justification had been eliminated, discrimination was the most likely alternative explanation, especially since DSS was in the best position to put forth the actual reason for its decision. Furnco Constr. Corp. V. Waters, 438 U.S. 567, 577, 57 L.Ed. 2d 957, 98 S. Ct. 2943. (When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons of the employer's actions, it is more likely that not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration").

There exists strong precedent that a defendant's motives, intentions and/or knowledge can be very relevant evidence that might be helpful to the factfinder.[2]

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[2] The general principles against exclusions of relevant evidence were outlined in Estes v. Dick Smith Ford, Inc., 856 F. 2d 1097, 1103 (8th Cir. 1988) which stated that:

The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which a plaintiff must face the difficult task of persuading the fact-finder to disbelieved an employer's account of its own motive.... Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices- evidence which in other kinds of cases may unfairly prejudice the jury against the defendant.

Furthermore, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive. As the Fourth Circuit noted in Warren v. Halstead Indus., Inc., 802 F.2d 746 (4th Cir.1986):

> Evidence of a general atmosphere of discrimination may also be considered: proof of historically limiting opportunity or harassment. Even where such past discriminatory acts are time barred for purposes of a particular claim, the Supreme Court has stated that this type of a showing "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." ... In addition, evidence of a general atmosphere of discrimination may be considered with other evidence bearing on motive in deciding whether a plaintiff has met his burden of showing that the defendant's articulated reasons are pretextual... Thus, evidence of racial harassment or threats, though not the subject of a distinct claim, is relevant to the determinations of intent and pretext. Id. at 753.

The evidence involving why Ms. McNeil did not have a permanent position, the fact that she was assigned duties at the pleasure of management, the fact that she performed case worker duties while employed as a clerk and the fact that DSS misrepresented why she was given duties on a daily basis was introduced to show both the state of mind and motive of DSS. Where a plaintiff seeks to prove discriminatory state of mind or intent, the probative value of conduct and/or statements revealing the retaliatory attitudes of the decisionmaker is great. This is so because of the inherent difficulty of proving state of mind. As the Supreme Court has noted, "there will seldom be 'eyewitness' testimony as to the employer's mental processes." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983).

The evidence as forecasted by Ms. McNeil supported a clear inference that after each promotion attempt, uncorroborated allegations by DSS would surface about her work performance or conduct. Ms. McNeil's pretext evidence demonstrated first that DSS originally claimed she was not qualified for the positions. When she rebutted that contention, DSS then modified their reasons by misrepresenting that her duties had to be assigned to her on a daily basis because she was inefficient when the evidence clearly showed their refusal to provide her with a position description was the reasons she was assigned duties on a daily basis and that they continued to assign her caseworker assignments despite passing her over for these promotions.

When an employee provides sufficient evidence for the fact finder to reject the nondiscriminatory explanation offered by the employer, not only may the fact finder continue to infer discrimination from the prima facie evidence, but the fact finder now has additional evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988).

This evidence offered by Ms. McNeil was clearly "material" under the pretext analysis of Title VII and directly contradicted the non-discriminatory reasons articulated by DSS in such a manner as to satisfy the "genuine dispute" aspects of Rule 56. However, this evidence of pretext was simply not adequately considered by the District Court in its order granting summary judgment for DSS. While Title VII law sufficiently defines the nature of what is pretext evidence, there does not appears to be a standard or consistent practice as to how

evidence of pretext which is introduced by the nonmoving party should be considered by a court in ruling on a summary judgment motion.

While a court cannot weigh the evidence during summary judgment, there does not appear to be a standard measurement that would be suitable to assist reviewing courts from either ignoring or perhaps simply not adequately considering pretext evidence offered by the nonmovant. The phrasing by the court that "a reasonable jury could not have returned a verdict in favor of the non-moving party" presupposes that not only has some type of weighing of the evidence has at least informally occurred, but that a credibility determination has already been made not only about the non-movant's evidence, but of a prospective jury's competence to hear this evidence.

The evidence forecasted by Ms. McNeil was sufficient to raise a question of fact as to whether the purported reasons for her non-selection were retaliation that resulted from her protected activities. DSS's refusal to give Ms. McNeil a permanent job schedule while suggesting that she was inefficient in her work performance was clear evidence of that they were concocting reasons to discredit her performance and should have been given to a jury for resolution. While it is clearly not illegal for an employer to withhold a permanent position description from an employee, efforts by that employer to misrepresent daily tasks being issued to an employee (not assigned a permanent position description) under the pretense that this employee did not manage her work efficiently was engaged in misconduct, but whether that belief was genuine or pretextual." Id. at 1080.

The evidence forecasted by Ms. McNeil proved that DSS could not have possibility believed their allegations. There is no evidence that Ms. McNeil refused to perform her

work although she was never given a job description. Furthermore, there is no evidence that she did not attempt to perform the assignments given to her even though she was denied the training that was afforded to her co-workers. And yet, DSS continuously disciplined Ms. McNeil for deficiencies with her case worker duties while denying her proper training to perform these tasks.

The District Court assigned more weight to DSS's assessment as to the quality of Ms. McNeill's work performance over that of Ms. McNeil or her co-workers was misplaced. The court did not consider that this evidence went beyond simply confirming the type and quality of her work. This evidence as forecasted by Ms. McNeil was introduce to corroborate the harassment and hostility in the working environment that Ms. McNeil was experiencing. The perceptions by these witnesses as to the harassing treatment Ms. McNeil was subjected and the type and quality of work she performed as a casework was credible evidence that should not have been disregarded.

It has become increasingly difficult for African American plaintiffs to pursue race and retaliation claims at the trial and appellant levels which stems from a subtle form of judicial hostility towards discrimination claims. There is in existence a general misconception that employment cases are easy-not difficult-to win, and the volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits. See in general, Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win, 61 La. L. Rev 555 (2001) (Courts appear hesitant to draw inferences of discrimination based on circumstantial evidence, even though courts have long recognized that discrimination is generally subtle in form and dependent on circumstantial evidence).

Ms. McNeil's evidence proved that her working environment was so polluted with retaliation and harassment, that she was significantly impeded from performing her job or seeking promotions. The law is clear that Ms. McNeil was entitled "to have the credibility of (her) evidence as forecasted assumed, (her) version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to (her)." Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990). While the District Court was not required to weigh the evidence nor try to determine the truth of the matter, Anderson v. Liberty Lobby, Inc. 447 US. at 249, it was error for the District Court to consider Ms. McNeil's evidence of harassment that impeded her ability to be promoted as simply her "opinion" about the quality of her work.

The basic principles in the holding in Reeves was that a prima facie case of discrimination, combined with sufficient evidence for a trier of fact to believe the defendant's legitimate, nondiscriminatory reason for its decision, was sufficient as a matter of law to show intentional discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 130, 120 S.Ct. 2097, 68 U.S.L.W. 4480., 82 Fair. Empl. Prac. Cas (BNA 1748. (June 12, 2000). The District Court did not give fair consideration to the evidence showing Ms. McNeil was never given fair opportunities for any promotions because of her protected activities and that the subjective factors that the defendants claim they relied upon were concocted in order to impede her ability to compete for these promotions. Her evidence of a hostile environment which came in the form of how she was mistreated after she filed her EEOC charges and her subsequent termination created a material issues of fact and should not have been dismissed as simply her opinion about the quality of her work environment. With each inference being drawn against Ms. McNeil by the District Court

adopting the contentions of DSS, it was virtually impossible for her to prove her pretext evidence.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit and ultimately, to vacate and reverse and remand this case to the District Court for trial.

This the 14th day of April 2003.

James H. Locus, Jr.
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BAR #: 13852

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1707

LENORA MCNEIL,
Plaintiff - Appellant,

versus

SCOTLAND COUNTY, a body politic and incorporated,
Defendant - Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge. (CA-01-388-1)

Submitted: November 22, 2002
Decided: December 18, 2002

Before NIEMEYER, LUTTIG, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James H. Locus, Jr., Fayetteville, North Carolina, for Appellant. Cecil W. Harrison, Jr., David L. Woodard, POYNER & SPRUILL, L.L.P., Raleigh, North Carolina, for Appellee.

I

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Lenora McNeil appeals the district court' s order granting summary judgment in her former employer's favor on her claims of employment discrimination. We have reviewed the parties' briefs,* the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See McNeil v. Scotland County, 213 F. Supp. 2d 559 (M.D.N.C. 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

In her appellate and reply briefs, McNeil raises claims of a hostile work environment and "continuing violations" of discrimination. This Court generally does not address claims raised for the first time on appeal. First Va. Banks, Inc. v. BP Exploration & Oil Inc., 206 F.3d 404, 407 n.1 (4th Cir. 2000) (declining to consider issues raised for first time on appeal) . We also find that McNeil has abandoned her wrongful discharge claim under the North Carolina Equal Employment Practices Act by failing to raise it in her brief. Edwards v. City of Goldsboro, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (noting that issues not briefed or argued are deemed abandoned).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LENORA McNEIL,

Plaintiff,

v. CIVIL NO. 1:01CV00388

SCOTLAND COUNTY a body politic and incorporate,

Defendant.

ORDER and JUDGMENT

Filed: May 24, 2002

BULLOCK, District Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Defendant's renewed motion to dismiss Plaintiff's NCEEPA claim [Doc. #29-1] is **GRANTED**, and Defendant's NCEEPA claim is **DISMISSED**;

IT IS FURTHER ORDERED that Defendant's renewed motion to strike [Doc. #29-2] is **DENIED** as moot; and

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment [Doc. #33] is **GRANTED**, and this action is **DISMISSED** with prejudice.

/s/
United States District Judge
May 24, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LENORA MCNEIL, co
LENORA MCNEIL

Plaintiff,

v. CIVIL NO. 1:01CV00-388

SCOTLAND COUNTY, a body politic and incorporate,

Defendant.

MEMORANDUM OPINION

Filed: May 24, 2002

BULLOCK, District Judge

On April 11, 2001, Plaintiff Lenora McNeil ("Plaintiff") filed this action against her employer Defendant Scotland County Department of Social Services ("Defendant"). On September 25, 2001, Plaintiff filed a second amended complaint against Defendant, alleging that Defendant failed to promote her and wrongfully discharged her based on retaliation' in violation of Title VII of the Civil Rights Act of 1964, as amended,,42 U.S.C. §2000e et seq. ("Title VIII'), Defendant failed to reasonably accommodate her alleged disability in violation of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101 et seq. ("ADA"), and Defendant wrongfully discharged her in violation of the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.1 et. seq.(IINCEEPA").

'In Plaintiff's second amended complaint, Plaintiff also averred that Defendant wrongfully terminated Plaintiff because of her race. Plaintiff failed to address racial

discrimination in any brief, and therefore any claim based on race fails as a matter of law.

This matter is before the court on a renewed motion to dismiss and to strike and a motion for summary judgment by Defendant. For the following reasons, the court will grant -Defendant's motion for summary judgment and will grant the renewed motion to dismiss the NCEEPA claim. The court will deny the renewed motion to strike as moot.

PROCEDURAL BACKGROUND

Plaintiff filed this action on April 22, 2001, asserting claims of retaliatory failure to promote and wrongful discharge in violation of Title VII, wrongful discharge in violation of NCEEPA, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff also sought punitive damages. Plaintiff filed an amended complaint on June 25, 2001, asserting no new causes of action.

On May 24, 2001, Defendant served motions requesting the court to dismiss or to strike Plaintiff's state law claims, her claim for punitive damages, the "Damages" claim, and the federal wrongful discharge claim. Following responses and reply briefs, the court entered an order on August 9, 2001, allowing Plaintiff to request a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") with respect to the federal wrongful discharge claim.

After receiving a right-to-sue letter, Plaintiff filed a second amended complaint on September 25, 2001, alleging failure to promote and wrongful discharge based on retaliation in violation of Title VII, disability discrimination in violation of the ADA, and wrongful discharge in violation of the NCEEPA. Plaintiff abandoned her punitive damages claim and all state claims, except the NCEEPA claim.

FACTS

A. Plaintiff's Work History

The following facts, except where noted, are undisputed. Based essentially on her own unsupported opinions, Plaintiff disputes Defendant's characterization of her work performance and qualifications.

In February 1995, Defendant hired Plaintiff to serve as a Clerk Assistant III in the Medicaid unit. Following a six-month probationary period, Plaintiff became a permanent employee in August 1995. After Plaintiff became a permanent employee, her performance declined. On October 25, 1995, Plaintiff's supervisor, Joe Knott, issued Plaintiff a formal verbal warning concerning her poor attitude toward co-employees and clients. Although it was one of Plaintiff's job responsibilities, Plaintiff admits telling a caseworker to type her own Medicaid card, but denies having a poor attitude toward co-employees. Plaintiff's performance improved temporarily after the formal warning.

Because Plaintiff expressed a desire to become a caseworker and she lacked the relevant experience, Knott assigned Plaintiff to an Income Maintenance Technician I position in the spring of 1997. In addition to her clerical duties, Plaintiff was responsible for Medicaid eligibility reviews and client intake reviews.

On November 4, 1997, Defendant completed Plaintiff's only formal, written evaluation. Plaintiff received an overall "B" rating, defined as "meets job requirement." (Pl.'s Aff. Ex. 10.) Although Plaintiff made "great improvement as a team player", Plaintiff needed to improve her constructive use of

time and take on more responsibility regarding the Illinois Medicaid program and fraudulent claims. (Pl.'s Ex. 10.)

Despite the improvements noted in Plaintiff's November 4, 1997, evaluation, Plaintiff failed to exhibit the ability to work as a team member and get along with co-workers. Plaintiff consistently projected a negative attitude toward her supervisors and co-employees. Plaintiff's attitude and inability to work as a team member caused significant problems. For example, Plaintiff's negative attitude caused several caseworkers --c choose to perform tasks that Plaintiff should have been performing rather than ask Plaintiff for assistance. In June 1999, Eva Locklear, Plaintiff's supervisor from January 1999 to June 2000, met with Plaintiff to discuss ways in which Plaintiff could project a more positive attitude and improve her relationship with co-employees.

Defendant also alleges that Plaintiff did not effectively manage her time and was inefficient. On May 22, 1998, Knott issued Plaintiff a written warning noting that Plaintiff needed to manage her time more effectively. Furthermore, Plaintiff stated in an open meeting with a visitor present that "[she] did not know what [her] job was." (Knott Aff. Ex. 7.) In an effort to improve Plaintiff's efficiency, Locklear prepared a schedule of daily job functions for Plaintiff to follow.

Plaintiff's performance as an income maintenance technician was "lackluster, at best." (Knott Aff. ~ 6.) When conducting eligibility interviews of Medicaid applicants, Plaintiff frequently failed to obtain all required information, causing unnecessary delays in processing Medicaid applications. After Defendant repeatedly asked Plaintiff to seek guidance from her **supervisors in** approving and denying Medicaid applications, Plaintiff refused to do so, which resulted in the erroneous disposition of numerous Medicaid applications. When errors were detected and returned to Plaintiff for

correction, she would not acknowledge the errors and would not make the corrections. Plaintiff also took an inordinate amount of time to distribute Medicaid applications to the intake workers for processing. Furthermore, Plaintiff failed to follow instructions on several occasions in approving deductible cases and incorrectly authorized several cases. As a result of Plaintiff's mistakes, the State of North Carolina fined Defendant. On April 27, 2000, Locklear issued Plaintiff a written warning for failing to follow instructions while approving deductible cases.

Plaintiff, on the other hand, disputes the merits of Defendant's evaluation. Plaintiff contends that Locklear "commended [her] for doing a caseworker's job." (Pl.'s Aff. Ex. 20.) Plaintiff also alleges that Defendant did not properly train her and wrongly accused her of failing to notify Locklear of a penalty in a deductible case, which resulted in Defendant being fined by the state. Furthermore, Plaintiff relies on statements from two co-employees. Jan-Marie Fesmire, the employee responsible for the administrative duties related to vacant positions, testified that Plaintiff met the initial qualifications for a caseworker position, which is not disputed. Valeria Ann McDuffie also averred that Plaintiff was qualified for a caseworker position and that, although Plaintiff did not speak to co-employees often, Plaintiff was able to communicate with other employees. However, Plaintiff essentially relies on her own unsupported opinions to challenge Defendant's evaluation.

In August 1998, Plaintiff applied for caseworker positions in the Medicaid and Food Stamps units. Defendant did not select Plaintiff for either promotion, and Plaintiff initially filed an internal grievance addressed to Knott and subsequently filed a charge of discrimination with the EEOC alleging racial discrimination. Neither of these failed promotions is before the court.

Thereafter, between April 1999 and November 1999, Plaintiff applied for several promotions. Defendant did not select Plaintiff for any promotion, and Plaintiff attributed a retaliatory motive to Defendant's decisions and filed charges of discrimination with the EEOC in each instance she was denied a promotion.

B. Failed Promotions-April. July, and August 1999

Plaintiff applied for three promotions between April and August 1999. In April 1999, Plaintiff applied for a caseworker position in the Medicaid unit. On April 22, 1999, Plaintiff interviewed for the position with Locklear (Plaintiff's supervisor), Cheryl Primus (lead worker in the Medicaid unit), and Knott (Plaintiff's former supervisor). In July 1999, Plaintiff interviewed for a caseworker position in the Food Stamp unit with Linda Boyer (supervisor of the Food Stamp unit-) and Knott. In August 1999, Plaintiff interviewed for a caseworker position in the Medicaid unit with Locklear and Knott. Plaintiff was not selected for any of these promotions, and on October 6, 1999, filed a charge of discrimination with the EEOC alleging retaliation for filing previous charges of discrimination against Defendant. The EEOC issued Plaintiff a right-to-sue letter on January 8, 2001, which Plaintiff received on January 11, 2001. Plaintiff filed this action within ninety (90) days of receipt of the right-to-sue letter.

Defendant contends that Plaintiff was not promoted because she was less qualified than the applicants selected for promotion. In making its decision, relevant factors included the following: (1) the attitude applicants projected in the interview and their answers to the questions posed; (2) prior work performance and work experience; (3) the ability of applicants to interact with co-employees and the general public, which is required for a caseworker position; (4)

communication skills; and (5) demonstrated or projected initiative and ability to work on an independent basis.

Defendant alleges that based on Plaintiff's work history and experience she was not as qualified as other applicants who were selected for the promotions at issue. Plaintiff performed poorly on an initial eligibility test required for caseworker applicants. Second, as discussed above, Plaintiff's inefficiency,inability to interact with supervisors, co-employees, and the general public, and lack of progress and performance as an income maintenance technician affected Defendant's decision not to promote Plaintiff. Plaintiff's inability to work on an independent basis as an income maintenance technician was also a factor in Defendant's decision not to promote Plaintiff.

Moreover, Plaintiff did not perform well in the interviewing process. Defendant places critical importance on the interview results. Knott, Plaintiff's supervisor, interviewed all applicants for the April, July, and August 1999 caseworker positions. At each of these interviews, Knott, as well as other personnel, asked all applicants the same questions. Plaintiff projected a negative attitude during the interview and gave vague responses to questions.

Defendant contends that Janice Morrison, Felisa Lockey, and Ethena Locklear, applicants selected for the April, July, and August 1999 caseworker positions, respectively, were more. The particular test results are not directly related to the applications for caseworker positions that are at issue in this case; Plaintiff's performance, however, is indicative of her qualifications qualified than Plaintiff. Defendant alleges that each of the applicants gave impressive, clearly thought out, and enthusiast responses to interview questions. In addition, these applicant-s' respective prior work histories and experiences were factors in the decision-making process. Both Lockey and Locklear had social service agency

experience, and Morrison had been a local government employee in a position that required significant interaction with the public and with financial matters.

C. Failed Promotion--October 1999

On October 14, 1999, Plaintiff applied for another caseworker position in the Medicaid unit. Despite the fact that Plaintiff did not interview for this position, Plaintiff received a letter from Defendant on November 9, 1999, thanking Plaintiff for interviewing for the position and informing her that another applicant was selected.

Defendant alleges that the letter was an inadvertent mistake. It is standard practice for Defendant to notify unsuccessful in-house applicants before the successful candidate is announced. Fesmire alleges that she mistakenly used the master letter on the computer thanking unsuccessful applicants for interviewing. This incorrect letter was erroneously delivered to three employees, including Plaintiff. Upon Plaintiff notifying Fesmire about the incorrect letter, Fesmire apologized and issued a corrected letter to each of the three employees.

Defendant alleges that Plaintiff was not selected for an interview because she did not have sufficient experience for the position, particularly when compared to the applicant who filled the position. Sandra McNeil, the applicant selected for the position, had been employed with Defendant for approximately ten (10) years as a caseworker and had an excellent work history as a caseworker.

Plaintiff contends that she was not selected for this promotion based on alleged retaliation for filing previous claims of discrimination. On February 29, 2000, Plaintiff filed a charge of discrimination with the EEOC. The EEOC issued a right-to-sue letter on January 8, 2001, which

Plaintiff received on January 11, 2001. Plaintiff initiated this action within ninety (90) days of receipt of the right-to-sue letter.

D. Failed Promotion-November 1999

On November 10, 1999, Plaintiff requested that her application be submitted for a caseworker position in the Food Stamp unit. When Fesmire reviewed Plaintiff's application on that same date, she noticed that it was outdated and not eligible. for consideration. Fesmire attempted to contact Plaintiff on November 10 to notify her of this problem, but was unsuccessful. Fesmire, however, drafted a letter to Plaintiff stating that she needed to update her application. Fesmire attempted to hand-deliver the letter to Plaintiff by the end of the workday on November 10, but Plaintiff was not at her desk. Fesmire was not in the office on November 11, 1999 (a state holiday, Veterans Day) and November 12, 1999 (a vacation day), so she asked a co-employee to hand-deliver the letter to Plaintiff on November 12, 1999. Fesmire also told the co-employee that if she could not personally deliver the letter to Plaintiff on November 12 she should mai.1 the letter to Plaintiff's home address because Plaintiff was starting family medical leave on November 15, 1999. Plaintiff was not in the office on November 12, 1999, and Defendant therefore mailed the letter to her. Plaintiff did not submit a renewed application for the position and was not considered for the position.

Plaintiff alleges that Defendant intentionally delayed notifying her that the application was outdated knowing that Plaintiff would be on family medical leave from November 15 to November 24, 1999. Plaintiff alleges that she did not leave the office until 6:00 p.m. on November 10, 1999. Plaintiff also contends that in the past Fesmire left letters on her desk and left messages on Plaintiff's voicemail, but failed to do so on November 10, 1999. On February 29,

2000, Plaintiff filed a charge of discrimination with the EEOC. The EEOC issued right-to-sue letter on January 8, 2001, which Plaintiff received on January 11, 2001. Plaintiff initiated this action within ninety (90) days of receipt of the right-to-sue letter.

E. Discharge

Plaintiff applied and Defendant granted leave pursuant to the Family Medical Leave Act ("FMLA") on June 8, 2000. Beginning on June 8, 2000, and continuing until September 8, 2000 (with the exception of the time period July 5 through July 12, 2000), Plaintiff was on FMLA leave. Plaintiff was not prepared to return to work in September, and Defendant agreed to place her on unpaid leave until October 31, 2000. Thus, from September 9, 2000, through October 31, 2000, Plaintiff was on unpaid extended leave of absence after Plaintiff exhausted her full FMLA leave benefits. During this time period (with the exception of July 5 through July 12, 2000), Plaintiff performed no work for Defendant.

On August 16, 2000, Fesmire wrote Plaintiff a letter advising Plaintiff that her FMLA leave would expire on September 8, 2000, and providing Plaintiff additional information about extended leave without pay. On September 6, 2000, Fesmire again wrote Plaintiff concerning the same information.

Subsequent to the two letters dated August 16 and September 6, 2000, Plaintiff's daughter, Antwannia McQueen, notified Defendant that she was given permission to speak on her mother's behalf and requested Defendant not speak to Plaintiff directly and to address all correspondence to: Lenora McNeil, c/o Sally McNeil (Plaintiff's mother), 1006 Shaw Street, Laurinburg, North Carolina. At all times after September 8, 2000, Defendant did not speak directly to Plaintiff and mailed all correspondence in care of Plaintiff's mother as instructed.

On September 11, 2000, Defendant received a fax from Rosalyn Harris-Offutt, Plaintiff's healthcare provider. Harris-Offutt diagnosed Plaintiff as experiencing a "major depressive episode and severe melancholia," which are symptoms of post-traumatic stress disorder. (Fesmire Aff. Ex. 16.) In September 2000, Harris-Offutt indicated that the approximate duration of this condition would be six (6) months from August 12, 2000. Harris-Offutt later stated that "[s]ome symptoms may persist throughout [Plaintiff's] lifetime," (Second Am. Compl. Ex. I, June 13, 2001, letter), but released Plaintiff to return to work without restrictions (anywhere but with Defendant) in May 2001.

On October 16, 2000, Defendant advised Plaintiff by letter, addressed to Plaintiff in care of her mother as requested, that Defendant needed someone to fill her position on a fulltime basis. Defendant also requested Plaintiff to suggest options for keeping the position covered beyond October 31, 2000. Defendant requested a response by October.26, 2000. Defendant advised Plaintiff that if no options were available that could reasonably be accommodated, she would be discharged. Plaintiff did no-~ respond to the letter.

On October 30, 2000, having received no suggested accommodations or other response from Plaintiff, Defendant discharged her effective October 31, 2000. After Plaintiff's termination, Defendant posted Plaintiff's position as vacant on November 9, 2000, and filled it on December 1, 2000. The person who filled Plaintiff's position has worked on a fulltime basis since she was hired.

Plaintiff alleges that Defendant denied Plaintiff reasonable accommodation and subsequently discharged Plaintiff because of Plaintiff's disability and in retaliation for filing previous charges of discrimination against Defendant. Plaintiff alleges that Defendant directly contacted Plaintiff against her healthcare provider's instructions. On January

12, 2001, Plaintiff filed a charge of discrimination with the EEOC. The EEOC issued a right-to-sue letter on September 13, 2001. Plaintiff amended her complaint a second time and initiated this action within ninety (90) days of receipt of the right-to-sue letter.

DISCUSSION

A. Federal Claims

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on the relevant issues. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a (fact finder] might return a verdict in his favor." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 257 (1986). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. J-d. at 255. However, 11[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Id. at 252.

Title VTT--Retaliation Claims

Plaintiff has sued Defendant under Title VII alleging Defendant's refusal to promote her and ultimately discharging her was in retaliation for previously filing discrimination charges against Defendant. When a plaintiff presents an employment discrimination claim with insufficient direct evidence to raise a genuine issue c-' material fact, the plaintiff may proceed under the burden-shifting scheme of McDonnell Douglas. Brinkley v. Harbour Recreation Club, 180 F.3d 598, 607 (4th Cir. 1999).

Pursuant the McDonnell Douglas analysis, the plaintiff has the initial burden of establishing a prima facie case. McDonnell Douglas

Corp. v. Green, 411 U.S. 792, 802 (1973). If the plaintiff meets this initial burden, a presumption of discrimination arises, and the burden shifts to the defendant to produce, but not prove, a "legitimate, nondiscriminatory reason" for its decision. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the defendant meets its burden, the presumption of discrimination that arose from the prima facie case disappears, and the burden of proof is left with the plaintiff to show that the employer acted with a discriminatory intent and that its proffered explanation was a pretext for discrimination. Id. at 252-53. II(Evidence of pretext, combined with the plaintiff's 1:~rima facie case, does not compel judgment for the plaintiff, because it is not enough to disbelieve the employer; the fact finder must also believe the plaintiff's explanation of intentional discrimination." EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852 (4th Cir. 2001) (citing Reeves v- Sanderson Plumbing Prods.. Inc., 530 U.S. 133 (2000)). To prove a **prima facie** case of retaliation under Title VT7, Plaintiff must establish that: "(1) the plaintiff engaged in a protected activity, such as filing a complaint with the EEOC; (2) the employer acted adversely against the plaintiff; and (3) the protected activity was causally connected to the employer's adverse action." Beal v. Abbott Labs, 130 F.3d 614, 619 (4th Cir. 1997) (citing Carter v Ball, 33 F.3d 450, 460 (4th Cir. 1994)).

a. Failed Promotions

Assuming argued that Plaintiff established a prima facie case of retaliation, Defendant rebutted Plaintiff's prima facie case with legitimate, non-retaliatory reasons for each of its adverse actions. Because Plaintiff failed to rebut Defendant's legitimate, non-retaliatory reasons for each of its adverse

actions, Plaintiff's failed promotion claims cannot survive summary judgment.

Defendant did not promote Plaintiff to caseworker positions in April, July, and August 1999 because she was not the most qualified applicant for the position. Defendant established a legitimate, non-retaliatory reason for not promoting Plaintiff by producing evidence that better qualified applicants were selected for the caseworker positions. See Amirmokri v. Baltimore Gag & Elec Co, 60 F.3d 1126, 1129 (4th Cir. 1995) ("An employer may rebut a plaintiff's prima facie case by demonstrating that the person promoted was better qualified for the position."). First, Plaintiff's and the selected applicants' respective prior work performances and work experiences were factors in Defendant's decision not to promote Plaintiff. Plaintiff was unable to work on an independent basis as an income maintenance technician and was inefficient. Plaintiff also did not interact well with supervisors, co-employees, and the general public. on the other hand, each of the applicants selected for the caseworker positions had relevant experience. S-e-e- id. at 1130 (stating that an employer may consider "[an applicant's] outstanding performance [with her previous employer] and the more subjective factors like [her] good interpersonal skills and [her] ability to lead a team"). Second, Plaintiff performed poorly during the interview, while the applicants selected for the positions performed very well. See Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 515 (7th Cir. 1996) (concluding that evidence that a Filipino employee was not offered a promotion because three separate interviewers unanimously considered him the least qualified of applicants interviewing for a job constituted a legitimate, non-discriminatory reason not to give the employee the position).

Defendant also established a legitimate, non-retaliatory reason for not selecting Plaintiff for the October 1999 caseworker position. Defendant contends that Plaintiff did not have sufficient experience for the position particularly when compared to the applicant who was selected for the position. The applicant selected for the position had been employed by Defendant for approximately ten years as a caseworker and had an excellent work history as a caseworker.

Plaintiff failed to rebut Defendant's legitimate, non-retaliatory reasons for not promoting her. Plaintiff argues that Defendant acted with retaliatory intent and that the Defendant's explanation is a pretext for discrimination based on the following: (1) Plaintiff's assertions that she received positive evaluations prior to filing discrimination charges; (2) statements from a co-employee, Fesmire, that Plaintiff was qualified for the caseworker positions; and (3) statements from a co-employee, McDuffie, that Plaintiff was able to communicate with other employees.

None of Plaintiff's claims, individually or collectively, is sufficient to rebut Defendant's legitimate, non-retaliatory reason for not promoting Plaintiff. First, an employee's own opinion of her qualifications, without evidence to support it, fails to disprove an employer's explanation or show discrimination. Beall, 130 F.3d at 620 ("[Absent evidence of retaliatory motive, [the court will] leave to the employer's discretion the method of evaluating an employee's job performance."). Second, Defendant does not contest that Plaintiff met the initial requirements for a caseworker position--otherwise she would not have been interviewed for three of the caseworker positions; however, Plaintiff was not promoted because Defendant determined that she was not the best-qualified candidate. Plaintiff produced no evidence suggesting that Defendant's methodology of selecting the best qualified candidates was discriminatory.

Finally, testimony of a co-employee concerning Plaintiff's performance is insufficient to prove that Defendant's stated reasons for not promoting Plaintiff are pretext for retaliation. S-e-e- Hawkins v. Pepsico, Inc-, 203 F.3d 274, 280 (4th Cir. 2000). In sum, rather than produce "evidence that shows [Defendant's] assessment of her performance was dishonest or not the real reason for her termination--as the law requires--[Plaintiff] disputes the merits of [Defendant's] evaluations." Id.

Plaintiff also alleges that, in November 1999, Defendant intentionally delayed notifying her that the application was outdated. The evidence indicates that Defendant made a reasonable effort to notify Plaintiff that the application was out of date, and Plaintiff has produced no evidence that suggests a pretext for retaliation. Plaintiff's mere assertions of retaliation are insufficient to counter substantial evidence of legitimate, non-retaliatory reasons for an adverse employment action. S-ea Hawkins, 203 F.3d at 281 n.1. Thus, Plaintiff's failed promotion claims cannot survive summary judgment and fail as a matter of law.

b. Discharge

Plaintiff contends that she was terminated in retaliation for filing charges of discrimination with the EEOC. Due to mental health concerns, Plaintiff went on FMLA leave on June 8, 2000. When Plaintiff exhausted her FMLA leave on September 8, 2000, and was not prepared to return to work, Defendant granted Plaintiff additional unpaid leave until October 31, 2000. After notifying Plaintiff that Defendant needed to fill the position, and receiving no response from Plaintiff, Defendant discharged Plaintiff effective October 31, 2000.

Plaintiff has failed to establish a prima facie case. Plaintiff engaged in a protected activity (filing charges of

discrimination with the EEOC from 1998 to 2000) and Defendant acted adversely against Plaintiff (ultimately discharging Plaintiff); however, Plaintiff has failed to produce evidence that establishes the protected activity was causally connected to Defendant's adverse action. Plaintiff relies on Defendant's knowledge that Plaintiff filed EEOC charges of discrimination against Defendant. Plaintiff filed her last EEOC charge on February 29, 2000, and her discharge was effective October 31, 2000, approximately eight months later. "A lengthy time lapse between the employer becoming aware of the claimant's protected activity and the alleged adverse employment action negate[s] any inference that a causal connection exist[s]." Hooven-Lewis v. Caldera, 249 F.3d 259, 278 (4th Cir. 2001) (affirming summary judgment and holding that "a six month lag is sufficient to negate any inference of causation" under the Whistleblower Protection Act) (citing Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998)). Because Plaintiff presented no additional evidence to establish a causal connection between the Plaintiff's protected activity and Defendant's adverse action, Plaintiff's retaliatory discharge claim fails as a matter of law.

Even assuming argued that Plaintiff can establish a prima facie case, Defendant rebutted Plaintiff's prima facie case with a legitimate, non-retaliatory reason for terminating Plaintiff. Because Plaintiff failed to rebut Defendant's legitimate, non-retaliatory reason for discharging Plaintiff, Plaintiff's retaliatory discharge claim fails.

Defendant contends that it discharged Plaintiff because Plaintiff was unable to return to work and Defendant needed to fill her position. An employee's unavailability for work, where there is no legal obligation to maintain her employment, is a legitimate, non-retaliatory reason for termination. See Carter V, Smithfield's of Morehead, Inc,

No. 93-2034, 1995 WL 440415, at **3 (4th Cir. July 26, 1995) (unpublished opinion). Plaintiff does not dispute that she was unavailable for work at the time of her discharge and her unavailability is confirmed by Harris-Offutt, her healthcare provider.

Plaintiff established no evidence that Defendant's legitimate, non-retaliatory reason for discharging Plaintiff was a pretext for retaliation. Plaintiff contends that "Defendant coerced, intimidated, interfered with the exercise of Plaintiffs] right to obtain and recover from mental health treatment by contacting Plaintiff in an improper manner preventing her successful and timely recovery." (Pl.'s Mem. of Law in Resp. to Def.'s Mot. for Summ. J., p. 17). This allegation, however, does not establish a pretext for discrimination and, furthermore, is not supported by the evidence. Defendant did not directly contact Plaintiff after receiving instructions from Plaintiff's daughter not to do so, and Defendant addressed all correspondence in care of Plaintiff's mother as instructed. Thus, Plaintiff's retaliatory discharge claim fails as a matter of law

2. ADA -- Discharge Claim

Plaintiff also claims that Defendant discharged her on the basis of a disability in violation of the ADA. To establish a 1prima facie case under the ADA, Plaintiff must prove that (1) she has a disability; (2) that she was otherwise qualified for the job in question; and (3) she was discharged because of her disability. Baird ex rel. Baird v. Rose, 192 F.3d 462, 467, 470 (4th Cir. 1999). Plaintiff has also failed to establish a prima facie case of discrimination under the ADA.

Plaintiff failed to show that she has a "disability" as defined by the ADA. The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a

record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Plaintiff claims that she has a disability as defined by the ADA because she has been diagnosed as experiencing a "major depressive episode and severe melancholia," which are symptoms of post-traumatic stress disorder. (Fesmire Aff., Ex. 16.) Plaintiff's healthcare provider, Harris-Offutt, indicated in Sep-ember 2000 that the approximate duration of this condition would be six months from August 12, 2000. Although Harris-Offutt indicated that symptoms may persist throughout Plaintiff's life, she later released Plaintiff to return to work without restrictions (anywhere but with Defendant) in May 2001. Harris-Offutt saw Plaintiff for the first time in June 2000; therefore, Plaintiff's condition persisted for approximately eleven (11) months. Because a temporary condition is not a disability under the ADA, even if its requires an extended leave of absence, Plaintiff has failed to establish a "disability" as defined by the ADA. See Halperin v. Abacus Tech Corp., 128 F.3d 191, 199-200.(4th Cir. 1997), abrogated on other ground by Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999).

Even assuming argued that Plaintiff has a disability under the ADA, Plaintiff failed to establish that she is a "qualified individual" as defined by the ADA. The ADA defines "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Tyndall v. National Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 212-13 (4th Cir. 1994); 42 U.S.C. § 12111(8). An employee who cannot come to work, despite her employer's efforts to reasonably accommodate her disability, cannot be considered a qualified individual. Tyndall, 31 F.3d at 213 (stating that "an employee who does not come to work cannot perform any of [her] job functions, essential or otherwise") (internal citations omitted).

A reasonable accommodation does not require Defendant to wait indefinitely for Plaintiff's medical condition to be corrected. S-e& Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (internal citation omitted). Furthermore, "[i]n mandating only those modifications that qualify as reasonable, Congress clearly meant to avoid placing employers in an untenable business position." J-d. (citing Southeastern *Community College* v. Davis, 442 U.S. 397, 412 (1979)). Although Plaintiff does not use the term "indefinite" leave, the evidence indicates that Plaintiff was seeking indefinite leave. When Plaintiff's FMLA leave was **almost exhausted and** Defendant inquired when Plaintiff could return to work, Plaintiff was not able to indicate when she would be able to return to work. Plaintiff's healthcare provider, Harris-Offutt, was equally non-committal about when Plaintiff could return to work. Because an indefinite leave of absence is not an accommodation required by the ADA, Plaintiff's ADA claim fails as a matter of law.

B. *State* Law--Wrongful Discharge Claim

Defendant moves to dismiss, not through summary judgment but pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiff's state claim under North Carolina's Equal Employment Practices Act (IINCEEPAII). A court may dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Even after accepting all well-pleaded allegations in Plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in Plaintiff's favor, Plaintiff has not stated a claim upon which relief can be granted. Plaintiff alleges a cause of action for disability discrimination and retaliation under NCEEPA. NCEEPA provides:

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees. N.C. Gen. Stat. § 143-422.2. "[A]bsent a clear indication from the courts or the legislature of North Carolina that a private right of action does exist under the NCEEPA, it would be inappropriate for a federal court to create a private right of action under the NCEEPA.11 Smith v. First Un. Nat'l Bank, 202 F.3d 234, 247 (4th Cir. 2000) (internal quotation omitted). North Carolina courts have not recognized a private cause of action under NCEEPA. Id.; Cline v. Dahle, No. COA01-94, 2002 WL 857552, at *7 (N.C. App. May 7, 2002) (holding that "our courts have never found that violation of the NCEEPA creates a private right of action"). Defendant, therefore, is entitled to judgment as a matter of law on the state wrongful discharge claim.

CONCLUSION

In sum, the record in this case reflects that. Defendant agreed to accommodate Plaintiff's desire to be a caseworker by placing her in a position to gain experience in 1997, despite her less-than-satisfactory work record at that time. Thereafter, Plaintiff received a performance rating of "B" and continued to experience problems with her work. Plaintiff has presented no evidence that Defendant's failure to promote Plaintiff on several later occasions was anything other than Defendant's selection of better qualified and better performing employees for the positions. Although Plaintiff filed EEOC charges as a result of her non-selection for the promotions, Plaintiff's difficulties at work preceded her filing of the initial charge. Plaintiff has presented no evidence to connect Defendant's failure to promote her to the fact that she had filed a prior charge with the EEOC.

As for Plaintiff's discharge claim, the record reflects that Defendant allowed Plaintiff to remain on leave for two additional months after her FMLA leave was exhausted. When Plaintiff failed to return to work and did not contact the Defendant despite Defendant's request and indication that Defendant would consider any suggestions by Plaintiff for keeping her job open, Plaintiff was terminated. Defendant's unavailability to work is a legitimate reason for terminating Plaintiff's employment, and is not a violation of the anti-retaliation provisions of Title VII or of the ADA.

The court will grant Defendant's motion for summary judgment and will grant the renewed motion to dismiss the NCEEPA claim. The court will deny the renewed motion to strike as moot.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

/s/
United States District Judge
May 24, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED January 27, 2003

No. 02-1707
CA-01-388-1

LENORA MCNEIL,
Plaintiff - Appellant

v.

SCOTLAND COUNTY, a body politic and incorporated
Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition fox rehearing and rehearing en banc was submitted to this Court. AS no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition fox reheating and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
MAY 14 2003
OFFICE OF THE CLERK

No. 02-1508

In The
Supreme Court of the United States

LENORA MCNEIL,

Petitioner,

v.

SCOTLAND COUNTY,
NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATUTE

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The Respondent Scotland County ("Respondent") respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Fourth Circuit Court of Appeals in this case. The unpublished *per curiam* opinion of the Fourth Circuit is reported at 53 Fed. Appx. 242; 2002 U.S. App. Lexis 26140 (4th Cir. Dec. 18, 2002).

STATEMENT OF THE CASE

Petitioner Lenora McNeil ("Petitioner") was formerly employed by Respondent in the Scotland County Department of Social Services ("DSS"). During the course of her employment, Petitioner was denied several promotions to caseworker positions and was eventually terminated on the basis of her admitted inability to perform her job. Petitioner filed suit in the United States District Court for the Middle District of North Carolina claiming, *inter alia*, that DSS's decisions not to promote her and to discharge her violated Title VII of the Civil Rights Act of 1964 because those decisions were allegedly in retaliation for her filing charges of discrimination with the Equal Employment Opportunity Commission.

In the District Court, Respondent presented undisputed evidence of the legitimate, non-retaliatory and non-discriminatory reasons for its employment decisions. Based on this undisputed evidence, the District Court allowed Respondent's motion for summary judgment on Petitioner's Title VII claim. In her appeal to the Fourth Circuit Court of Appeals, Petitioner again failed to dispute Respondent's reasons for its employment decisions, and the Court of Appeals affirmed the District Court's Judgment.

A. Facts Related to Failure to Promote.

DSS hired Petitioner in February 1995 as a Clerk Assistant III. Petitioner performed adequately during her six-month probationary period for this position, but, following completion of her probationary period, Petitioner's performance steadily declined.

While employed by DSS, Petitioner expressed an interest in becoming a caseworker, but she lacked relevant experience. To help Petitioner realize her goal of becoming a caseworker, her supervisor assigned Petitioner to an Income Maintenance Technician I position in July of 1997. Petitioner remained responsible for her clerical duties in this new position, but she was given additional responsibilities, such as Medicaid eligibility reviews and client intake interviews, which were intended to provide Petitioner with relevant caseworker experience. Petitioner's performance as an Income Maintenance Technician I was unimpressive. When conducting eligibility interviews of Medicaid applicants, Petitioner frequently failed to obtain all required information. As a result, DSS often had to re-contact applicants to secure missing eligibility information. Petitioner's omissions caused unnecessary delays in processing Medicaid applications. Furthermore, Petitioner refused to seek guidance from her supervisors in approving and denying Medicaid applications, even though DSS repeatedly told her to do so. Her refusal to seek guidance resulted in erroneous disposition of numerous Medicaid applications. When errors were detected and returned to Petitioner for correction, she would not acknowledge the corrections or the errors. In addition, Petitioner failed to follow instructions on

several occasions and incorrectly authorized several cases. These mistakes resulted in the DSS being fined by the State of North Carolina.

As a Clerk III and Income Maintenance Technician I, Petitioner never exhibited the qualities that her supervisors required of a caseworker, such as the ability to work as a team member and the ability to get along with others in the office. Petitioner consistently projected a negative attitude toward her supervisors and fellow employees. Petitioner's attitude and inability to work as a team member caused significant problems. For instance, Petitioner's negative attitude caused caseworkers to choose to perform tasks that Petitioner should have been performing rather than ask Petitioner for assistance. Petitioner's negative attitude and inability to be a team player permeated virtually her entire employment history at DSS.

Petitioner exhibited these shortcomings throughout 1999, when she applied for the caseworker positions that are at issue in this case. As discussed *infra*, Petitioner was not selected for a caseworker position because she was never the most qualified candidate, due in large part to her negative attitude and inability to work with others.

B. Facts Related to Discharge.

Petitioner applied for and was granted leave under the Family and Medical Leave Act ("FMLA") on 8 June 2000. Except for a brief period in July 2000, Petitioner stayed out of work on FMLA approved leave until it was exhausted on 8 September 2000. Petitioner

was not prepared to return to work in September, so DSS chose to place her on discretionary unpaid leave until 31 October 2000.

By the conclusion of Petitioner's period of unpaid leave, DSS needed to fill her position because requiring other staff members to perform her duties was becoming an unacceptable burden on those employees who were required to shoulder her responsibilities. DSS notified Petitioner by letter dated 16 October 2000 of its need to fill her position on a full-time basis. In the same letter, DSS invited Petitioner to suggest options for covering her position and continuing her employment beyond October 2000. DSS cautioned Petitioner, however, that if no options were available that could reasonably be accommodated, she would be discharged. Petitioner offered no suggestions in response to the letter. On 30 October 2000, having received no suggested accommodations from Petitioner, DSS discharged her effective 31 October 2000. Soon thereafter, DSS filled Petitioner's position with a person who was available to perform the regular duties of that position on a full time basis.

REASONS THE WRIT SHOULD NOT ISSUE

I. PETITIONER DOES NOT REQUEST THE COURT TO ADDRESS A SIGNIFICANT OR BROADLY APPLICABLE LEGAL PRINCIPLE, BUT RATHER ASKS THE COURT TO EVALUATE THE FACTS OF THIS PARTICULAR CASE AND DETERMINE IF HER EVIDENCE WAS SUFFICIENT TO PROVE DSS'S STATED REASONS FOR ITS EMPLOYMENT DECISIONS ARE PRETEXT FOR RETALIATION.

Although Petitioner's statement of the "Questions Presented" suggests that Petitioner seeks reconsideration or modification of the long standing evidentiary standard applicable to motions for summary judgment in Title VII cases, the body of her Petition reveals that she actually requests the Court to issue a writ of certiorari for the sole purpose of reviewing (under the current standard) the evidence introduced in the District Court and to conclude that her evidence was sufficient to prove that DSS's articulated reasons for its employment decisions are pretext for retaliation. In short, Petitioner requests the Court to perform the function of a Circuit Court of Appeals and to issue a ruling that would impact only the litigants in this case.

Even if Petitioner actually seeks modification of the existing evidentiary standard, she does not suggest any new standard, nor does she demonstrate why a

new or modified standard is necessary. Any effort on her part to do so would be futile because the existing standard and this Court's decisions applying that standard provide adequate guidance to the lower courts and litigants on the issue of proving pretext.

The evidentiary standard applicable to motions for summary judgment in Title VII claims is well-established, straightforward, and easily applied, particularly to the uncomplicated and uncontroverted facts of this case. This Court established the effective burden shifting analysis applicable to Title VII cases in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), under which (1) a plaintiff is required to establish a prima facie case of discrimination or retaliation, (2) the defendant employer is then required to come forward with evidence of legitimate, non-discriminatory or non-retaliatory reasons for its employment decision, and, finally (3) the plaintiff has the burden of proving that the defendant's articulated reasons are not the true reasons for its decisions but were a pretext for discrimination or retaliation.

Since deciding *McDonnell Douglas*, the Court has provided ample guidance on the application of this standard as it relates to the proof that is necessary to satisfy the burden of proving that an employer's stated reasons for an employment decision are pretext for unlawful discrimination or retaliation. The Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), that the evidence presented by defendant to rebut a plaintiff's prima facie case serves "simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to

frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. It is obvious from *Burdine* that a plaintiff must address head on an employer's articulated reasons for its employment decision, and demonstrate that those reasons were not the true reasons for the decision, if she is to have any chance of defeating the employer's motion for summary judgment. The Court later clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), that proof that the employer's articulated reasons were false, together with elements of the prima facie case, would support a finding of pretext and intentional discrimination. Thus, the type of proof that an employee must produce in order to survive a motion for summary judgment when an employer presents legitimate reasons for its decisions is clearly defined - quite simply, the employee must present evidence that the employer's stated reasons for its employment decisions are false, or are not the true reasons for its decisions. *See also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Petitioner does not advocate the rejection, extension or modification of the rulings from the above decisions. Her Petition for Writ of Certiorari contains no suggestion of how the foregoing decisions are flawed or inadequate to guide the district and circuit courts in rendering decisions in Title VII cases at the summary judgment stage. Indeed, from Petitioner's heavy reliance on the current decisions from this Court and the Fourth Circuit Court of Appeals in support of her argument that lower courts erred, it is evident that

she merely desires the Court to reconsider the evidence and to enter a decision in her favor under the existing standard. Clearly, Petitioner does not present an issue warranting consideration by this Court.

II. THERE IS NO CONFLICT OF AUTHORITY BETWEEN THE FOURTH CIRCUIT COURT OF APPEALS AND ANY OTHER CIRCUIT COURT OF APPEALS THAT REQUIRES RESOLUTION BY THIS COURT.

Petitioner's only arguable challenge to existing law in the Fourth Circuit is her contention that the lower courts should not have given DSS's assessment of Petitioner's performance greater weight than the Petitioner's own assessment of her performance. This contention is in direct conflict with established precedent in the Fourth Circuit, as set out in *Beall v. Abbott Lab.*, 130 F.3d 614, 619 (4th Cir. 1997) (citing *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996)) and *Hawkins v. PepsiCo, Inc.* 203 F.3d 274 (4th Cir. 2000) *cert. denied*, 531 U.S. 875, 121 S. Ct. 181, 148 L. Ed. 2d 125, *reh'g denied*, 531 U.S. 1031, 121 S. Ct. 613, 148 L. Ed. 2d 524 (2000). To the extent Petitioner relies on her apparent challenge to the rule in *Beall* and *Hawkins* to support her Petition, she fails to present a reason for this Court to grant the Petition. The Fourth Circuit's rule in *Beall* and *Hawkins* is in accord with every circuit court of appeals that has addressed the issue. *See, e.g., Shorette v. Rite Aid of Maine, Inc*, 155 F.3d 8 (1st Cir. 1998) (citing consistent decisions from the 4th, 7th, 10th, and 11th circuits); *Billet v. Cigna Corp.*, 940 F.2d 812 (3rd Cir. 1991) (citing

consistent decisions from 4th and 6th circuits); *Edmund v. MidAmerican Energy Co.* 299 F.3d 679 (8th Cir. 2002); *Shackelford v. DeLoitte & Touche, LLP*, 190 F.3d 398 (5th Cir. 1999). Thus, there is no conflict between the circuits for the Court to resolve.

III. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS WOULD BE AFFIRMED UNDER ANY EVIDENTIARY STANDARD BECAUSE PETITIONER FAILED TO ADDRESS RESPONDENT'S ARTICULATED REASONS FOR ITS EMPLOYMENT DECISIONS.

The Court should deny the Petition because, on the record before the Court, the Petitioner could not prove, under any conceivable standard, that DSS's articulated reasons for its employment standards were pretext for retaliation. Accordingly, granting the Petition would not alter the outcome of this case.

Petitioner's Title VII claim is based on her allegation that DSS retaliated against her for filing charges of discrimination with the Equal Employment Opportunity Commission when it denied her promotions to four caseworker positions in 1999 and terminated her in October 2000. DSS articulated numerous legitimate non-discriminatory and non-retaliatory reasons for each of its challenged employment decisions. Other than to vaguely dispute DSS's assessment of her work performance and conduct, Petitioner did not challenge the reasons stated by DSS for its decisions.

Petitioner was interviewed but not selected for caseworker positions in April, July and August of 1999.

DSS demonstrated that it did not select Petitioner for these positions because, in each instance, she was adjudged far less qualified than the other applicants based on the criteria considered by the DSS. For instance, Petitioner consistently scored relatively poorly on a standard written examination that was used as an initial screening device, even though she took the same test several times. DSS also produced undisputed evidence that Petitioner did not perform well in interviews, which were of critical importance in the selection procedure.

DSS's undisputed evidence showed that for each open caseworker position, all applicants were evaluated using the following five factors: (1) the attitude the applicants projected during the interview and their answers to the questions posed, (2) prior work performance and work experience, (3) how the applicants got along, or would get along, with (a) fellow employees and (b) the general public with whom caseworkers would be required to interact, (4) communication skills, and (5) demonstrated or projected initiative and ability to work on an independent basis.

In each instance Petitioner was interviewed, each of the interviewers determined, based on the five factors set forth above, that Petitioner was not the most qualified candidate. This determination was based on the generally negative attitude Petitioner projected during the interviews, her vague responses to questions, her lack of progress in her job and her job performance issues during her employment at DSS, her poor interaction and lack of teamwork with fellow employees, their belief (based on both the interviews and her work history) that she would not relate well to

the public the agency serves, and her failure to demonstrate appropriate initiative, independence and a sustained level of acceptable performance in her then-current position at DSS. Furthermore, the uncontradicted evidence demonstrated that all applicants selected for caseworker positions had much more relevant experience than Petitioner did.

With respect to the October 1999 position, DSS showed that Petitioner was not interviewed or selected because she was far less qualified for the position than the applicant who was selected. The person selected for the position had been employed by DSS for approximately 10 years as a caseworker and had enjoyed a successful work history as a caseworker. Petitioner had been with DSS for only approximately four years, had never held a caseworker position and suffered the shortcomings addressed above.

Under the *McDonnell Douglas* burden shifting analysis, once DSS articulated legitimate, non-retaliatory reasons for its employment decisions, Petitioner had the burden of coming forward with evidence demonstrating that DSS's articulated reasons were pretext for retaliation. Petitioner could not satisfy her burden of proving pretext with bald assertions of retaliatory motive, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 n.1 (4th Cir.), *cert. denied*, 531 U.S. 875, 121 S. Ct. 181, 148 L. Ed. 2d 125, *reh'g denied*, 531 U.S. 1031, 121 S. Ct. 613, 148 L. Ed. 2d 524 (2000), or by showing simply that that DSS was aware that she engaged in a protected activity. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (*citing Williams v. Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989)). As explained in *Burdine*, DSS's articulated reasons for its employment decisions framed the issues before the Court and put Petitioner

on notice that she must present evidence that the specific reasons articulated by DSS for its employment decisions were not the real reasons for its decisions. *Burdine*, 450 U.S. at 255-56, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217; *Hawkins*, 203 F.3d at 281.

Even though there was clear direction from the Supreme Court and Fourth Circuit Court of Appeals as to what evidence Petitioner was required to produce to create a question of fact on the issue of pretext, Petitioner essentially ignored DSS's reasons for its promotion decisions and failed to raise even a weak inference that they were not the real reasons for DSS's decisions. She presented no evidence or argument suggesting that she was the better-qualified candidate for the positions she sought. She did not discuss, or even acknowledge the existence of, other job candidates in her arguments to the courts below. She presented no evidence (i) indicating that DSS did not honestly assess Petitioner's qualifications relative to the other applicants, (ii) showing that DSS's interview process was flawed or applied in a discriminatory fashion, or (iii) disputing that the successful applicants had better attitudes, better interpersonal skills, greater experience, and were otherwise better qualified for the caseworker positions when measured against the criteria used in DSS's selection process. Petitioner gave no more than passing mention to the interview and selection process in her arguments.

With respect to the November 1999 caseworker position that Petitioner claims to have been wrongfully denied, the uncontradicted evidence established that Petitioner was not considered for this position because she failed to submit an updated application in compliance with Respondent's personnel policies.

Petitioner conceded in her pleadings and in the lower court proceedings that her application was out of date and, therefore, ineligible for consideration. In addition, she presented no evidence showing that DSS's refusal to consider her application was caused by anything other than DSS's objectively reasonable compliance with its personnel policies. In short, as with the other caseworker positions, Petitioner presented no evidence that would support a finding that DSS's stated reasons for not selecting Petitioner for the November 1999 position was pretext for retaliation.

With respect to her termination, Petitioner failed to establish a prima facie case of retaliatory discharge. Petitioner's last protected activity was the filing of an EEOC charge of discrimination on 28 February 2000. Her discharge occurred approximately eight months later, on 31 October 2000, after Petitioner failed to report to work at the conclusion of her extended leave period. The remoteness of the protected activity from the termination defeated Petitioner's claim of retaliatory discharge. *See Hoven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (addressing claim under Whistleblower Protection Act).

Even if Petitioner had established a prima facie case of retaliation, her retaliatory discharge claim was properly dismissed. DSS showed that it terminated Petitioner because she did not return to work after her extended leave period expired and she could perform no work for DSS at a time when it was necessary for DSS to fill her position. On 8 June 2000, Petitioner left work on leave allowed under the FMLA. Petitioner exhausted her FMLA leave on 8 September 2000, but she reportedly was unable to return to work at that time. Petitioner had no more accrued leave available

when her FMLA leave expired, but, rather than terminate Petitioner's employment at that time, DSS exercised its discretion and allowed Petitioner an additional 51 days of unpaid leave, until 31 October 2000. At the conclusion of this extended leave period, DSS needed to fill Petitioner's position on a full time basis because allocating Petitioner's duties to other staff members was becoming an unmanageable burden on the Department. By letter dated 16 October 2000, DSS notified Petitioner of its need to fill her position and invited her to suggest options that would allow the Department to keep her on the payroll. However, DSS expressly cautioned Petitioner that if there were no options that could reasonably be accommodated, she would be discharged on the basis of her unavailability. Petitioner never contacted DSS to discuss her options.

Petitioner never disputed that she was unavailable for work at the time of her discharge, and her unavailability was confirmed by her healthcare provider. Furthermore, according to Petitioner's healthcare provider, Petitioner could not have returned to work with DSS even as late as May 2001, approximately seven months after her termination. Because Petitioner had exhausted all of her available leave, could perform no work when DSS needed someone to perform her regular duties, and suggested no alternatives to preserve her job, DSS had no choice but to discharge Petitioner so that it could fill her position.

In summary, Petitioner presented no evidence upon which any court could conclude, under any conceivable standard, that DSS's reasons for not selecting Petitioner for promotions and for terminating

her employment were pretext for retaliation. The Court should, therefore, deny the Petition for Writ of Certiorari.

IV. THE PETITION IS REPLETE WITH MISSTATEMENTS OF FACT.

The Court should deny the Petition for Writ of Certiorari because Petitioner's representation of the facts is inaccurate in many respects. The Court therefore cannot rely on the facts represented by Petitioner in deciding whether or not to issue a writ of certiorari. The following misstatements appear in the Petition:

1. Petitioner claims that (i) "there was no evidence offered in the record that the quality of her work was an issue until after she filed her EEOC charges," (Pet. p. 4), (ii) "there was no evidence in the record that prior to Ms. McNeils's first EEOC charge that she was ever guilty of misconduct or malfeasance of her duties," (Pet. p. 4), and (iii) that immediately after she applied for caseworker positions, DSS would intentionally criticize her work product in order to inhibit her advancement with DSS. (Pet. p. 4)

The record contradicts these statements. Petitioner filed her first charge of discrimination in November 1998. The record on appeal contains documented criticism and warnings relating to Petitioner's work product that date well in advance of this charge. Petitioner even admitted in her memorandum of law opposing DSS's Motion for Summary Judgment that she received two formal written warnings concerning her performance prior to ever filing a charge of discrimination.

Moreover, the record before the District Court and Court of Appeals contained examples of and references to numerous oral, verbal, formal and informal criticisms and warnings related to Petitioner's performance throughout her entire employment history with DSS, as opposed to only immediately after she applied for caseworker positions.

2. Petitioner claims that she was never given a permanent job description. This contention has no relation to DSS's articulated reasons for its employment decisions, but even if the contention was probative of pretext, it is demonstrably false. Petitioner filed exhibits in the District Court in which she refers explicitly to her supposedly nonexistent job description. It should also be noted that in the District Court Petitioner never related a single one of her work-related problems to the lack of a job description. The entire job description argument was an irrelevant afterthought, raised improperly for the first time in the Court of Appeals.

3. Petitioner claims that "it was uncontroverted that she made very few errors." (Pet. p. 4). This statement also is demonstrably false. The record before the District Court and Court of Appeals is replete with documented examples of Petitioner's errors, some of which resulted in DSS being fined by the State of North Carolina. Petitioner even conceded some of these errors in the exhibits she filed in the District Court.

4. Petitioner claims that DSS "created a paper trail of concocted and misleading representations about Ms. McNeil's work performance solely to impede her efforts to be promoted." (Pet. p. 5). This claim is false. Petitioner offered no competent evidence to support this claim. It is based strictly on Petitioner's self-

assessment of her performance and abilities, which, as addressed above, is not competent in any circuit to rebut an employer's evaluation of an employee's performance.

Furthermore, the claim that DSS "scrutinized" Petitioner's work does not prove, or even suggest, that Petitioner did not commit the errors cited in her written warnings or that her performance was not poor in other respects. More importantly, the claim of close scrutiny, even if it was true, does not relate to the interviews, selection process, and ranking of candidates that DSS relied upon in making hiring decisions for caseworker positions. At most, this evidence shows only a difference of opinion over the quality of Petitioner's performance, which is irrelevant to whether or not Petitioner was as qualified as other applicants for caseworker positions.

5. Petitioner claims that there was no evidence that she ever refused to perform her work (Pet. pp. 17, 18). However, Petitioner admitted engaging in this misconduct in her memorandum of law opposing DSS's motion for summary judgment. In addition, the affidavits of Petitioner's supervisors describe examples of Petitioner not taking direction from her supervisors and failing to perform her regular duties until her omissions were brought to her supervisors' attention and she was expressly directed to perform them.

6. Petitioner claims that DSS changed its stated reasons for not promoting Petitioner. This claim is a fabrication, and, like the job description argument, was improperly raised for the first time in the Court of Appeals. Petitioner asserts that DSS first took the position that she was not qualified for a caseworker position. (Pet. pp. 5, 16), that DSS later "modified their

(sic) contentions as to why Ms. McNeil was not considered for a promotion by claiming that it was her lack of teamwork and poor efforts that made her an unsuitable applicant," (Pet. pp. 5-6), and that "DSS then sought to balance their 'legitimate' reason for not fairly considering Ms. McNeil for each promotion by claiming that she was either not qualified or that she lacked the required interpersonal skills." (Pet. p. 6).

In the Court of Appeals, Petitioner cited the deposition testimony of one of her supervisors to support her claim that DSS "first took the position that she was not qualified." The cited portion of the transcript revealed, however, that Petitioner's supervisor was not asked why Petitioner was not promoted. Rather, Petitioner's counsel asked the supervisor a pointed question - was Petitioner qualified for caseworker positions - to which he responded she was not, based on his personal experience. The supervisor's concise response obviously was not an exhaustive description of the reasons Petitioner was not promoted or why she was not as qualified as the competing applicants.

In support of the alleged subsequent "modification" of DSS's reasons for not promoting Petitioner, Petitioner cited a memorandum that was actually drafted nearly two years before the above referenced deposition testimony was given, and which set out in great detail Petitioner's shortcomings as they relate to her multiple job applications and work performance. The memorandum actually described many more problems with Petitioner's performance than the two examples cited in the Petition.

Finally, to support her claim of the so called "balancing" of reasons, Petitioner referred to her supervisor's summary judgment affidavit, in which he described the interview process and all of the factors considered by DSS in determining that Petitioner was not the most qualified candidate for any of the caseworker positions for which she was considered. This affidavit does not contradict or conflict in any way with her supervisor's deposition testimony or the above referenced memorandum.

In summary, a review of the sources cited by Petitioner in support of her claim that DSS changed its reasons for its decisions will reveal that DSS consistently maintained that Petitioner was not the most qualified candidate for any caseworker position and will further reveal that none of the depositions, memoranda, or affidavits in the record contain contradictory statements concerning those reasons.

7. Petitioner claims that she demonstrated that DSS's assessment of her as not the most qualified candidate was pretextual because it conflicts with the deposition testimony of an employee named Jan Marie Fesmire, who testified that Petitioner met the minimal eligibility requirements for a caseworker position and was qualified for the position in that sense. (Pet. p. 5). This claim is highly misleading. Ms. Fesmire is a personnel assistant. Her role in the hiring process is to assemble job applications and to determine, as an initial matter, whether or not an applicant satisfies the basic eligibility requirements for a particular position. She serves no further function in the screening and selection process. She makes no hiring decisions, she does not interview candidates for any positions in DSS, and she makes no determination as to the relative

strengths, weaknesses, or qualifications of applicants for a particular position. Thus, contrary to what Petitioner is trying to convince the Court, Ms. Fesmire's statement that Petitioner was qualified, in the sense that she met the basic eligibility requirements of a caseworker position, does not conflict with DSS's determination that Petitioner was not the most qualified applicant for any of the caseworker positions at issue in this case.

8. Petitioner seems to contend that DSS's decisions to assign a few caseworker responsibilities to Petitioner refutes DSS's assessment of her abilities. (Pet. pp. 10-13). In making this claim, Petitioner ignores DSS's undisputed evidence that it gave Petitioner these relatively simple caseworker responsibilities in order to provide her with relevant experience, which was intended to make her a more attractive candidate for a caseworker position. Furthermore, this claim casts no doubt on DSS's honest assessment that, in spite of DSS's efforts to train Petitioner, she was not the most qualified candidate for any of the caseworker positions at issue in this case.

9. Petitioner seems to suggest that DSS articulated a false reason for terminating her. (Pet. p. 10). Petitioner contends that DSS told Petitioner she was terminated for not responding to a letter from a DSS representative, when, in Ms. McNeil's view, her representative did respond to the letter. Petitioner distorts the record to make this claim. The record accurately reveals the following: Approximately two weeks prior to the expiration of Petitioner's unpaid leave, DSS mailed a letter to Petitioner inviting her to suggest options for covering her position and continuing her employment. Petitioner completely

ignored this request, even though DSS cautioned Petitioner in the same letter that failure to agree on an option that could reasonably be accommodated would result in her termination. When Petitioner failed to contact DSS with a suggested accommodation by the specified deadline, DSS terminated Petitioner as it warned her it would. DSS mailed Petitioner a termination notice in which it referenced its earlier request that Petitioner contact DSS with suggested options and stated that because DSS had not heard from Petitioner, her leave without pay status and her employment would end effective 31 October 2000.

It appears that Petitioner might contend that a note from her healthcare provider purporting to further extend Petitioner's medical leave (for approximately the seventh time) was a response to DSS's request that Petitioner suggest options to continue her employment. Petitioner's argument defies common sense. In DSS's 16 October 2000 letter requesting options to continue Petitioner's employment, it informed Petitioner that her leave could not be extended any further. In light of DSS's clear statement that it could not extend Petitioner's leave, Petitioner's healthcare provider's note purporting to further extend the leave was non-responsive and could not be considered a suggestion of legitimate option for maintaining Petitioner's employment. Therefore, the reasons stated in DSS's 30 October 2000 letter for Petitioner's termination were accurate and truthful and were not contradicted by any evidence in the record.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

This the 14th day of May, 2003.

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